

and prohibited behavior rests not on the definitional distinction between furnishing and transmitting, but on the excepted nature of the information furnished by the employee. The information originating from the employee does not lose its excepted character because it is transmitted by the employer.

The Department's position regarding the furnishing and transmission of certificates of one's own blacklist status rests on a similar basis and does not support the contention that third parties may transmit prohibited information authored by another. Such self-certifications do not violate any prohibitions in the EAR (see Supplement Nos. 1(I)(B), 2, and 5(A)(2); §760.2(f), example (xiv)). It is the Department's position that it is not prohibited for U.S. persons to transmit such self-certifications completed by others. Once again, because furnishing the self-certification is not prohibited, third parties who transmit the self-certifications offend no prohibition. On the other hand, if a third party authored information about another's blacklist status, the act of transmitting that information would be prohibited.

A third example in the EAR (§760.5, example (xiv) of this part), which also concerns a permissible transmission of boycott-related information, does not support the theory that one may transmit prohibited information authored by another. This example deals with the reporting requirements in §760.5 of this part—not the prohibitions—and merely illustrates that a person who receives and transmits a self-certification has not received a reportable request.

It is also the Department's position that a U.S. person violates the prohibitions against furnishing information by transmitting prohibited information even if that person has received no reportable request in the transaction. For example, where documents accompanying a letter of credit contain prohibited information, a negotiating bank that transmits the documents, with the requisite boycott intent, to an issuing bank has not received a reportable request, but has furnished prohibited information.

While the Department does not regard the suggested distinction between transmitting and furnishing information as meaningful, the facts relating to the third party's involvement may be important in determining whether that party furnished information with the required intent to comply with, further, or support an unsanctioned foreign boycott. For example, if it is a standard business practice for one participant in a transaction to obtain and pass on, without examination, documents prepared by another party, it might be difficult to maintain that the first participant intended to comply with a boycott by passing on information contained in the unexamined documents. Resolution of such intent questions, however, depends upon an analysis of the individual

facts and circumstances of the transaction and the Department will continue to engage in such analysis on a case-by-case basis.

This interpretation, like all others issued by the Department discussing applications of the antiboycott provisions of the EAR, should be read narrowly. Circumstances that differ in any material way from those discussed in this interpretation will be considered under the applicable provisions of the Regulations.

#### SUPPLEMENT NO. 16 TO PART 760— INTERPRETATION

Pursuant to Articles 5, 7, and 26 of the Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan and implementing legislation enacted by Jordan, Jordan's participation in the Arab economic boycott of Israel was formally terminated on August 16, 1995.

On the basis of this action, it is the Department's position that certain requests for information, action or agreement from Jordan which were considered boycott-related by implication now cannot be presumed boycott-related and thus would not be prohibited or reportable under the regulations. For example, a request that an exporter certify that the vessel on which it is shipping its goods is eligible to enter Hashemite Kingdom of Jordan ports has been considered a boycott-related request that the exporter could not comply with because Jordan has had a boycott in force against Israel. Such a request from Jordan after August 16, 1995 would not be presumed boycott-related because the underlying boycott requirement/basis for the certification has been eliminated. Similarly, a U.S. company would not be prohibited from complying with a request received from Jordanian government officials to furnish the place of birth of employees the company is seeking to take to Jordan because there is no underlying boycott law or policy that would give rise to a presumption that the request was boycott-related.

U.S. persons are reminded that requests that are on their face boycott-related or that are for action obviously in furtherance or support of an unsanctioned foreign boycott are subject to the regulations, irrespective of the country of origin. For example, requests containing references to "blacklisted companies", "Israel boycott list", "non-Israeli goods" or other phrases or words indicating boycott purpose would be subject to the appropriate provisions of the Department's antiboycott regulations.

#### PART 762—RECORDKEEPING

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AUTHORITY: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 14, 2002, 67 FR 53721, August 16, 2002.

SOURCE: 61 FR 12900, Mar. 25, 1996, unless otherwise noted.

### § 762.1 Scope.

In this part, references to the EAR are references to 15 CFR chapter VII, subchapter C.

(a) *Transactions subject to this part.* The recordkeeping provisions of this part apply to the following transactions:

(1) Transactions involving restrictive trade practices or boycotts described in part 760 of the EAR;

(2) Exports of commodities, software, or technology from the United States and any known reexports, transshipment, or diversions of items exported from the United States;

(3) Exports to Canada, if, at any stage in the transaction, it appears that a person in a country other than the United States or Canada has an interest therein, or that the item involved is to be reexported, transshipped, or diverted from Canada to another foreign country; or

(4) Any other transactions subject to the EAR, including, but not limited to, the prohibitions against servicing, forwarding and other actions for or on behalf of end-users of proliferation concern contained in §§ 734.2(b)(7) and 744.6 of the EAR. This part also applies to all negotiations connected with those transactions, except that for export control matters a mere preliminary inquiry or offer to do business and negative response thereto shall not constitute negotiations, unless the inquiry or offer to do business proposes a transaction that a reasonably prudent exporter would believe likely to lead to a violation of the EAA, the EAR or any order, license or authorization issued thereunder.

(b) *Persons subject to this part.* Any person subject to the jurisdiction of the United States who, as principal or agent (including a forwarding agent),

participates in any transaction described in paragraph (a) of this section, and any person in the United States or abroad who is required to make and maintain records under any provision of the EAR, shall keep and maintain all records described in § 762.2 of this part that are made or obtained by that person and shall produce them in a manner provided by § 762.6 of this part.

### § 762.2 Records to be retained.

(a) *Records required to be retained.* The records required to be retained under this part 762 include the following:

(1) Export control documents, as defined in part 772 of the EAR;

(2) Memoranda;

(3) Notes;

(4) Correspondence;

(5) Contracts;

(6) Invitations to bid;

(7) Books of account;

(8) Financial records;

(9) Restrictive trade practice or boycott documents and reports, and

(10) Other records pertaining to the types of transactions described in § 762.1(a) of this part, which are made or obtained by a person described in § 762.1(b) of this part.

(b) *Records retention references.* Paragraph (a) of this section describes records that are required to be retained. Other parts, sections, or supplements of the EAR which require the retention of records or contain recordkeeping provisions, include, but are not limited to the following:

(1) Part 736, General Prohibitions;

(2) § 732.6, Steps for other requirements;

(3) § 740.1, Introduction (to License Exceptions);

(4) § 740.10(c), Servicing and replacement of parts and equipment (RPL);

(5) § 740.13(f), Technology and software—unrestricted (TSU);

(6) § 742.12(a)(3), High Performance Computers;

(7) Supplement No. 3 to part 742 High Performance Computers, Safeguards and Related Information;

(8) § 742.15;

(9) § 740.7, Humanitarian donations (NEED);

(10) § 748.4(a), Disclosure and substantiation of facts on license applications;

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- (11) § 748.6, General instructions for license applications;
- (12) § 748.9, Support documents for license applications;
- (13) § 748.10, Import and End-user Certificates;
- (14) § 748.11, Statement by Ultimate Consignee and Purchaser;
- (15) § 748.13, Delivery Verification (DV);
- (16) § 748.2(c), Obtaining forms; mailing addresses;
- (17) § 750.7, Issuance of license and acknowledgment of conditions;
- (18) § 750.8, Revocation or suspension of license;
- (19) § 750.9, Duplicate licenses;
- (20) § 750.10, Transfer of licenses for export;
- (21) § 752.7, Direct shipment to customers;
- (22) § 752.9, Action on SCL applications;
- (23) § 752.10, Changes to the SCL;
- (24) § 752.11, Internal Control Programs;
- (25) § 752.12, Recordkeeping requirements;
- (26) § 752.13, Inspection of records;
- (27) § 752.14, System reviews;
- (28) § 752.15, Export clearance;
- (29) § 754.2(j)(3), Recordkeeping requirements for deep water ballast exchange.
- (30) § 754.4, Unprocessed western red cedar;
- (31) § 758.1(h), Record and proof of agent's authority;
- (32) § 758.1 and § 758.2, Shipper's Export Declaration or Automated Export System record;
- (33) § 758.6, Destination control statements;
- (34) § 760.6, Restrictive Trade Practices and Boycotts;
- (35) § 762.2, Records to be retained;
- (36) § 764.2, Violations;
- (37) § 764.5, Voluntary self-disclosure; and
- (38) § 766.10, Subpoenas;
- (39) § 743.1, Wassenaar reports;
- (40) § 748.14, Exports of firearms;
- (41) § 745.1, Annual reports;
- (42) § 745.2, End-use certificates; and
- (43) § 758.2(c), Assumption writing.

[61 FR 12900, Mar. 25, 1996, as amended at 61 FR 27258, May 31, 1996; 61 FR 65466, Dec. 13, 1996; 64 FR 17974, Apr. 13, 1999; 65 FR 14860, Mar. 20, 2000; 65 FR 42573, July 10, 2000; 68 FR 16213, Apr. 3, 2003]

### § 762.3 Records exempt from record-keeping requirements.

(a) The following types of records have been determined to be exempt from the recordkeeping requirement procedures:

- (1) Export information page;
  - (2) Special export file list;
  - (3) Vessel log from freight forwarder;
  - (4) Inspection certificate;
  - (5) Warranty certificate;
  - (6) Guarantee certificate;
  - (7) Packing material certificate;
  - (8) Goods quality certificate;
  - (9) Notification to customer of advance meeting;
  - (10) Letter of indemnity;
  - (11) Financial release form;
  - (12) Financial hold form;
  - (13) Export parts shipping problem form;
  - (14) Draft number log;
  - (15) Expense invoice mailing log;
  - (16) Financial status report;
  - (17) Bank release of guarantees;
  - (18) Cash sheet;
  - (19) Commission payment back-up;
  - (20) Commissions payable worksheet;
  - (21) Commissions payable control;
  - (22) Check request forms;
  - (23) Accounts receivable correction form;
  - (24) Check request register;
  - (25) Commission payment printout;
  - (26) Engineering fees invoice;
  - (27) Foreign tax receipt;
  - (28) Individual customer credit status;
  - (29) Request for export customers code forms;
  - (30) Acknowledgement for receipt of funds;
  - (31) Escalation development form;
  - (32) Summary quote;
  - (33) Purchase order review form;
  - (34) Proposal extensions;
  - (35) Financial proposal to export customers;
- and
- (36) Sales summaries.
- (b) [Reserved]

[61 FR 12900, Mar. 25, 1996, as amended at 62 FR 25469, May 9, 1997]

### § 762.4 Original records required.

The regulated person must maintain the original records in the form in which that person receives or creates

them unless that person meets all of the conditions of § 762.5 of this part relating to reproduction of records. If the original record does not meet the standards of legibility and readability described in § 762.5 of this part and the regulated person intends to rely on that record to meet the recordkeeping requirements of the EAR, that person must retain the original record.

**§ 762.5 Reproduction of original records.**

(a) The regulated person may maintain reproductions instead of the original records provided all of the requirements of paragraph (b) of this section are met.

(b) In order to maintain the records required by § 762.2 of this part, the regulated persons defined in § 762.1 of this part may use any photographic, photostatic, miniature photographic, micrographic, automated archival storage, or other process that completely, accurately, legibly and durably reproduces the original records (whether on paper, microfilm, or through electronic digital storage techniques). The process must meet all of the following requirements, which are applicable to all systems:

(1) The system must be capable of reproducing all records on paper.

(2) The system must record and be able to reproduce all marks, information, and other characteristics of the original record, including both obverse and reverse sides of paper documents in legible form.

(3) When displayed on a viewer, monitor, or reproduced on paper, the records must exhibit a high degree of legibility and readability. (For purposes of this section, legible and legibility mean the quality of a letter or numeral that enable the observer to identify it positively and quickly to the exclusion of all other letters or numerals. Readable and readability mean the quality of a group of letters or numerals being recognized as complete words or numbers.)

(4) The system must preserve the initial image (including both obverse and reverse sides of paper documents) and record all changes, who made them and when they were made. This information must be stored in such a manner

that none of it may be altered once it is initially recorded.

(5) The regulated person must establish written procedures to identify the individuals who are responsible for the operation, use and maintenance of the system.

(6) The regulated person must establish written procedures for inspection and quality assurance of records in the system and document the implementation of those procedures.

(7) The system must be complete and contain all records required to be kept by this part or the regulated person must provide a method for correlating, identifying and locating records relating to the same transaction(s) that are kept in other record keeping systems.

(8) The regulated person must keep a record of where, when, by whom, and on what equipment the records and other information were entered into the system.

(9) Upon request by the Office of Export Enforcement, the Office of Antiboycott Compliance, or any other agency of competent jurisdiction, the regulated person must furnish, at the examination site, the records, the equipment and, if necessary, knowledgeable personnel for locating, reading, and reproducing any record in the system.

(c) *Requirements applicable to systems based on the storage of digital images.* For systems based on the storage of digital images, the system must provide accessibility to any digital image in the system. With respect to records of transactions, including those involving restrictive trade practices or boycott requirements or requests. The system must be able to locate and reproduce all records relating to a particular transaction based on any one of the following criteria:

(1) The name(s) of the parties to the transaction;

(2) Any country(ies) connected with the transaction; or

(3) A document reference number that was on any original document.

(d) *Requirements applicable to a system based on photographic processes.* For systems based on photographic, photostatic, or miniature photographic processes, the regulated person must maintain a detailed index of all records in

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the system that is arranged in such a manner as to allow immediate location of any particular record in the system.

### § 762.6 Period of retention.

(a) *Five year retention period.* All records required to be kept by the EAR must be retained for five years from the latest of the following times:

(1) The export from the United States of the item involved in the transaction to which the records pertain or the provision of financing, transporting or other service for or on behalf of end-users of proliferation concern as described in §§ 736.2(b)(7) and 744.6 of the EAR;

(2) Any known reexport, transshipment, or diversion of such item;

(3) Any other termination of the transaction, whether formally in writing or by any other means; or

(4) In the case of records of pertaining to transactions involving restrictive trade practices or boycotts described in part 760 of the EAR, the date the regulated person receives the boycott-related request or requirement.

(b) *Destruction or disposal of records.* If the Bureau of Industry and Security or any other government agency makes a formal or informal request for a certain record or records, such record or records may not be destroyed or disposed of without the written authorization of the agency concerned. This prohibition applies to records pertaining to voluntary disclosures made to BIS in accordance with § 765.5(c)(4)(ii) and other records even if such records have been retained for a period of time exceeding that required by paragraph (a) of this section.

### § 762.7 Producing and inspecting records.

(a) *Persons located in the United States.* Persons located in the United States may be asked to produce records that are required to be kept by any provision of the EAR, or any license, order, or authorization issued thereunder and to make them available for inspection and copying by any authorized agent, official, or employee of the Bureau of Industry and Security, the U.S. Customs Service, or any other agency of the U.S. Government, without any

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charge or expense to such agent, official, or employee. The Office of Export Enforcement and the Office of Antiboycott Compliance encourage voluntary cooperation with such requests. When voluntary cooperation is not forthcoming, the Office of Export Enforcement and the Office of Antiboycott Compliance are authorized to issue subpoenas requiring persons to appear and testify, or produce books, records, and other writings. In instances where a person does not comply with a subpoena, the Department of Commerce may petition a district court to have a subpoena enforced.

(b) *Persons located outside of the United States.* Persons located outside of the United States that are required to keep records by any provision of the EAR or by any license, order, or authorization issued thereunder shall produce all records or reproductions of records required to be kept, and make them available for inspection and copying upon request by an authorized agent, official, or employee of the Bureau of Industry and Security, the U.S. Customs Service, or a Foreign Service post, or by any other accredited representative of the U.S. Government, without any charge or expense to such agent, official or employee.

[61 FR 12900, Mar. 25, 1996, as amended at 65 FR 42573, July 10, 2000]

## PART 764—ENFORCEMENT AND PROTECTIVE MEASURES

Sec.

764.1 Introduction.

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SUPPLEMENT NO. 1 TO PART 764—STANDARD TERMS OF ORDERS DENYING EXPORT PRIVILEGES

AUTHORITY: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 14, 2002, 67 FR 53721, August 16, 2002.

SOURCE: 61 FR 12902, Mar. 25, 1996, unless otherwise noted.

### § 764.1 Introduction.

In this part, references to the EAR are references to 15 CFR chapter VII,